In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant, *v.* J. A. SODERBERG, APPELLEE. } No. 61.

BRIEF ON BEHALF OF THE UNITED STATES.

The grant to the Northern Pacific Railroad Company, its successors and assigns (act of July 2, 1864, 13 Stat., 365), is of—

> every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said

> time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The following provisos in the grant are pertinent to the question here presented:

> *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

By joint resolution, January 30, 1865 (13 Stat., 567), it was declared:

> That no act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Under the pleadings and agreed statement of facts the controlling question of law presented for decision

is whether land principally valuable for deposits of granite of good merchantable quality contained therein is within the exception of "mineral lands" stated in the grant to the railroad company and in the joint resolution of January 30, 1865.

The exception or exclusion of mineral lands from this grant is the same or similar in language to exceptions from numerous other railroad land grants which are still pending before the land department for administration and adjustment. A large portion of the Northern Pacific grant remains unsurveyed and a still larger portion remains unadjusted. Whether specific sections are of the character and class of lands which pass under the grant, or are excluded therefrom by reason of the exception of "mineral lands" is, therefore, not only a question of general public interest, but one in which the Government has a direct pecuniary interest. In view of this condition, the United States has been permitted to intervene in this case and to participate in the argument.

The chief contention by the Northern Pacific Company, briefly stated, is that Congress in this land-grant act and in prior laws, as well as in subsequent ones, has used the term "mineral lands" as including only the metalliferous minerals, and that, therefore, only lands containing minerals of that class are excepted from the grant.

We are unable to see how this contention can be sustained upon any other theory than that the general mining laws authorize the exploration, occupation, and

purchase only of lands containing metalliferous minerals. In other words, if the exception of "mineral lands" from railroad and other land grants be held to exclude from such grants only lands chiefly valuable for metalliferous substances, it must also be held that the general mining laws of the United States provide for the disposal only of lands containing like substances. It is not believed that Congress intended one rule to be applied in the determination and classification of lands as mineral within the meaning of the exception of "mineral lands" from railroad and other land grants, and that another and different rule should be applied in the determination and classification of lands as mineral within the meaning of the general mining laws. There is nothing in the acts of Congress making land grants in aid of the construction of railroads and for other purposes, or in the legislation relating to the disposal of the public mineral lands, to show such intention.

In *Davis* v. *Weibold* (139 U. S., 507, 519) this court considered and treated the exception of "mines" from the preemption and settlement laws, and the exception of "mineral lands" from railroad and other land grants, as meaning the same thing; and this is conceded to be true by counsel for the company. (See page 11 of their brief.)

In Lindley on Mines (Vol. I, sec. 86, p. 92) that author, speaking to the subject of "mineral lands" and kindred terms, says:

> Logically the term "mineral lands," and its equivalent terms, whenever used in the acts or

> grants of Congress, either as words of reservation or in the mining laws authorizing their appropriation, has the same limit and breadth of signification. What had been reserved by one series of legislative enactments, and in the different legislative grants, is identically that the appropriation of which is encouraged and sanctioned by another series of laws.

The same author, speaking of the exception of "mineral lands" from railroad and other land grants (Vol. I, sec. 152, p. 170), among other things, says:

> When these railroad acts became laws, the policy of the Government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the States for school purposes.
>
> However, in framing the railroad acts, Congress deemed it prudent to leave no room for dispute or discussion on this score, and inserted in each one of the acts clauses of reservation. The act of July 1, 1862, contained the proviso "that all mineral lands shall be excepted from the operation of this act." The amendatory act of July 2, 1864, provided that "any lands granted by this act, or the act to which this is an amendment, * * * shall not include * * * mineral lands, * * * or any lands returned and denominated as mineral lands."

> It is also provided "that the term 'mineral land,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron land." The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, contained reservations and limitations of similar import.

In the act of February 26, 1895 (28 Stat., 684), which provided for the examination and classification of mineral lands within the limits of the Northern Pacific Railroad Company's grant in the States of Montana and Idaho, but which were excepted from the grant on account of their mineral character, it was declared (section 3):

> That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such lands, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character: * * * *Provided*, That the word "mineral," where it occurs in this act, shall not be held to include iron or coal.

Here we have an unequivocal legislative declaration to the effect that the exception of "mineral lands" in the Northern Pacific Railroad Company's grant was

intended to embrace, and does embrace, all lands which, by reason of valuable mineral deposits, are subject to exploration, location, and purchase under the mining laws. The act plainly means that all lands containing valuable mineral deposits of whatever nature, whether metallic or nonmetallic, if subject to exploration and purchase under the mining laws, shall be classified as "mineral lands," within the meaning of the exception from this grant, not including, of course, coal and iron lands. In view of this legislative interpretation, it would seem to be clear that in the mind of Congress the term "mineral lands," as used in this grant, is the equivalent of the terms "lands valuable for minerals" and "all valuable mineral deposits," as used in the mining statutes.

We submit, therefore, that the term "mineral lands" and terms of like import, wherever used in the acts of Congress making railroad or other land grants, or in the mining laws, either as words of reservation or as authorizing the disposal of lands thus described, has the same meaning and the same breadth of signification. Lands which had been reserved as "mineral lands" by legislative enactments and in various railroad and other land grants prior to the enactment of the mining laws must be regarded as the same kind of lands the exploration, occupation, and purchase of which are authorized by the mining laws.

The inquiry then arises: What is the true meaning of the term "mineral lands" and other terms the equivalent thereof, such as "lands valuable for minerals,"

"valuable mineral deposits," etc., as these terms are used in railroad and other land grants, and in the United States mining laws? Do metallic minerals only fall within their meaning, or do they embrace minerals of the nonmetallic class as well?

The first act passed by Congress providing for the disposal of mineral lands was the act of July 1, 1864 (13 Stat., 343), wherein it was declared—

> That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as "mines," are excluded from the preemption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry—

should be subject to sale at the price and upon the terms therein prescribed. Prior to the passage of this act there was no law for the disposal of coal lands or other mineral lands of the public domain. The preemption act referred to is the act of September 4, 1841 (5 Stat., 453), which made provision for the entry and purchase of the vacant public lands, but declared that no lands on which were situated "known salines or mines" should be subject to entry or sale thereunder. The act of July 1, 1864, which it is important to note became a law the day before the act making the Northern Pacific grant was passed, was an express declaration by Congress that coal, a nonmetalliferous mineral, was included within the exception of "mines" from the preemption act. The case of *Mullan* v. *United States* (118 U. S., 271, 276) involved the direct

question whether coal lands were to be regarded as "mineral lands" within the meaning of that term as used in statutes regulating the disposition of the public domain. This court answered the question in the affirmative, and in its opinion, among other things, said:

> The important question in the case is whether the land, being coal land, was open to selection by the State as lieu school land. This was most elaborately considered by the circuit judge, and his opinion, reported in *United States* v. *Mullan* (7 Sawyer, 466), leaves little to be said on the subject. In *Mining Co.* v. *Consolidated Mining Co.* (102 U. S., 167) this court decided that "the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853, was not intended to cover mineral lands. Such lands were by the settled policy of the General Government excluded from all grants" at that time, and we quite agree with the circuit judge that "if sections 16 and 36, being mineral lands, do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of lands to be selected under section 7, in lieu of sections 16 and 36." The confirmatory act of July 23, 1866 (14 Stat., 218, ch. 219), expressly excludes from its operation all selections of mineral land. The case, therefore, turns on the question whether coal lands are mineral lands within the meaning of the term as used in the statutes regulating the disposition of the public domain.

> The first statute which made any reference to minerals on the public lands was that of September 4, 1841 (5 Stat., 453, 455, ch. 16, sec. 10), which provided that no preemption entry should be made on "lands on which are situated any known salines or mines;" and by the act of July 1, 1864 (13 Stat., 343, ch. 205, sec. 1), it was provided that "any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the preemption act of 1841, and which under past legislation are not liable to ordinary private entry," might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that "known" coal lands are mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that, after it was made, coal lands were to be treated as mineral lands.

Both by legislative declaration and by decision of this court it is shown that the term "mineral lands," used in laws relating to the disposal of the public domain, includes nonmetallic minerals as well as those of the metallic class.

If it had been intended by the exception of "mineral lands" to exclude from the grant only lands containing metallic minerals, it would have been wholly unnecessary to provide that the exception should not be held to include coal. The fact that the express exclusion of

coal, a nonmetallic mineral, from the exception was necessary in order to exclude it, shows conclusively that the term "mineral lands" was not used in the exception in the sense of embracing only metalliferous metals.

The statutes relating to the disposal of the public mineral lands, as originally enacted, are found in the act of July 1, 1864, already referred to, and in the acts of July 26, 1866 (14 Stat., 251), July 9, 1870 (16 Stat., 217), May 10, 1872 (17 Stat., 91), February 18, 1873 (17 Stat., 465), and March 3, 1873 (17 Stat., 607). The substantive provisions of these several acts have been incorporated in the Revised Statutes of the United States, sections 2318 to 2352, inclusive, under the head of "Mineral Lands and Mining Resources." These provisions, as they appear in the Revised Statutes, in so far as they need be here specifically mentioned, are as follows:

> Section 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.
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> Section 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and

> not inconsistent with the laws of the United States.

This section is the same as section 1 of the act of May 10, 1872.

Sections 2320 to 2324, inclusive, provide certain rules and regulations to govern the location of—

> Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits.

Sections 2325 to 2328, inclusive, provide for obtaining title from the Government for lands "claimed and located for valuable deposits" under the preceding sections.

Section 2329:

> Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but when the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

The provisions of this section are the same in effect as originally enacted. (Act July 9, 1870, *supra.*)

Shortly after the act of May 10, 1872, was passed, the Secretary of the Interior requested of the Attorney-General of the United States an official opinion upon the question whether the public lands containing deposits of diamonds were subject to location and

entry under said act. In an opinion (14 Op. A. G., 115) by the Attorney-General, given August 31, 1872, in response to said request, it was stated and held as follows:

> Section 1 of said act provides, "that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."
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> Section 6 of said act also provides the mode in which a patent may be obtained for land claimed and located for "valuable deposits."
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> Bainbridge, in his work on the law of mines and minerals (p. 1), says: "A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores."
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> Webster gives the following as the definition of a diamond: "A mineral and gem remarka-

ble for its hardness, as it scratches all other minerals."

* * * * *

Diamonds, then, are clearly "valuable mineral deposits," and the provisions of said act are as applicable to lands containing them, as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterwards be discovered as what might be overlooked in an enumeration of minerals in the statute.

Public lands for the purposes of sale are divided into agricultural and mineral lands. The minimum price of the former is $1.25 and the latter $5 per acre. Mineral lands, exclusive of their valuable deposits, are generally worth little or nothing. Prior to the act of July 26, 1866 (14 Stat., 251), it was customary for persons to take those deposits without respect to the rights of the United States. Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end.

I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands; for in that way, and not otherwise, can they be made to contribute something to the revenue of the Government, and controversy and litigation in mining localities, to a great extent, be prevented.

September 3, 1872, the Secretary of the Interior addressed to Commissioner Drummond of the General Land Office a communication wherein he referred to

said opinion of the Attorney-General, and with respect thereto said: "I concur in the views therein set forth, and they will guide your official action in cases of this character." (Copp's Mineral Lands, 119.)

July 15, 1873, Commissioner Drummond issued a circular of instructions to surveyors-general and registers and receivers (Copp's Mineral Lands, 61–62), wherein, speaking upon the subject of what constitutes "valuable mineral deposits" within the meaning of the mining laws, he said:

> I have had under consideration a number of letters, mostly from California, wherein inquiries are made as to the proper course to pursue to obtain title to public lands containing valuable deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt. Among them is one from the Nevada Consolidated Borax Company, from which it appears that this company intends to commence the utilization of the alkaline plains of Nevada.
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> The first section of the act of Congress approved May 10, 1872, reads as follows: "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," etc.
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> The second section declares "that mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located," etc.

The sixth section refers to "a patent for any land claimed and located for valuable deposits."

It will be observed that in the first section of the act the expression "valuable mineral deposits" is employed, while in the second and sixth sections the language is "valuable deposits." Allowing, however, that it was the intention of the lawmakers by this act to dispose of "valuable mineral deposits," the question becomes this, "What is a valuable mineral deposit?"

The meaning of the word valuable need not be discussed. Anything a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable. The word deposit has always been construed by this office to be a general term, embracing veins, lodes, ledges, placers, and all other forms in which valuable metals have ever been discovered.

In the sense in which the term mineral was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. The several authorities consulted in this connection seem to find it an easier task to determine what is not, than what is, mineral. However, in all the works on mineralogy that have come under my notice, borax, nitrate and carbonate of soda, sulphur, alum, and asphalt are classified and discussed as mineral.

Alger's edition of Phillips's Mineralogy speaks of "the crust of the globe as consisting chiefly of earths and earthy minerals." Between earths and minerals there is a clear line of demarkation, and, though difficult to express in a

few words, chemical composition and crystallization are the principal means of tracing the distinction. Webster seems to be the most accurate in his definition of a mineral, for he recognizes chemical composition as the important consideration. He defines a mineral to be "any inorganic species having a definite chemical composition."

From a careful examination of this matter, the conclusion I reach as to what constitutes "a valuable mineral deposit" is this:

That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

The language of the statute is so comprehensive, and capable of such liberal construction, that I can not avoid the conclusion that Congress intended it, as a general mining law, "to promote the development of the mining resources of the United States," and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except where a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands.

To the several inquiries in the letters referred to, I therefore reply, that lands valuable on

> account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining act of May 10, 1872.

Prior to the issuance of this circular a special statute had been enacted regulating the disposal of coal lands (act of July 1, 1864, *supra*), and the established policy of the Government had been to reserve salt springs and saline lands from sale absolutely. (*Morton* v. *Nebraska*, 21 Wall., 660; *Hall* v. *Litchfield*, Copp's Mineral Lands, 321; *Salt Bluff Placer*, 7 L. D., 549; *Southwestern Mining Co.*, 14 L. D., 597.) These things were doubtless in the mind of the Commissioner when the circular was issued. They furnish an explanation of the exceptions noted in the circular.

January 30, 1875, Commissioner Burdett of the General Land Office, in the case of William Clayton, held lands containing valuable deposits of umber or fire clay to be mineral lands within the meaning of the mining laws, and to be subject to entry and patent as such. On the same date, in a communication addressed to the surveyor-general of California, the same Commissioner held that lands valuable for deposits of petroleum could be entered and patented under the mining laws. (Sickels's Mining Decisions, p. 491.)

June 28, 1875, it was held by Commissioner Burdett, in the case of C. H. Rolfe (Copp's Mineral Lands, 194), that lands which are more valuable for deposits of limestone or marble than for purposes of agriculture are subject to entry and patent under the mining laws. On

the same day, in the case of J. D. M. Crockwell, it was held by the same Commissioner that "lands containing valuable deposits of kaolin may be patented under the mining acts." (Copp's Mineral Lands, 194.)

The case of William A. Arnold, decided by Commissioner Burdett December 3, 1875 (2 Copp's Land-Owner, 131), involved the question whether lands within the limits of the grant for the benefit of the Union Pacific Railroad, and which contained valuable deposits of mica, were within the exception of "mineral lands" from said railroad grant. It was there held:

> Lands containing valuable deposits of mica may be patented under the provisions of the mining act of May 10, 1872, upon full compliance with the law and instructions. From the operations of the grants to the different railroad companies are excepted all *mineral lands*, except those containing coal and iron, and title to mineral lands can only be acquired under said mining acts.

March 31, 1882, Commissioner McFarland, of the General Land Office, in a communication addressed to A. A. Dewey, Central City, Dakota (9 Copp's Land-Owner, p. 51), stated and held that:

> Lands containing deposits of petroleum have been entered as placers and patented as such. Your inquiries are fully answered, therefore, by stating that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims.

In the case of *Montague* v. *Dobbs*, decided by the same Commissioner November 23, 1882 (9 Copp's

Land-Owner, p. 165), it was held that lands containing valuable deposits of fire clay or kaolin, or other nonmetalliferous substances, were subject to location and entry as placer claims. In the course of the decision it was said:

> The common understanding of the term "placer" is deposits of débris or wash here and there upon the earth's surface, valuable as a "placer" deposit, because carrying gold; but Congress has enlarged upon the common understanding of the term, and included all deposits, excepting quartz or other rock in place. Section 2329 provides: "Claims usually called 'placers,' including all forms of deposit, with the exception just mentioned, shall be subject to entry and patent, under like circumstances, conditions and proceedings as are provided for vein or lode claims."

In a decision by the same Commissioner September 18, 1884, in the case of H. P. Bennett, jr. (3 L. D., 116), it was, among other things, held as follows:

> In his application for patent Mr. Bennett claims the land as a "deposit of valuable building rock." The register reports that "it is evidently not agricultural land, and there appears to be no lode claim within it or in its vicinity;" also, that he has taken some pains to investigate its character in an informal way, and is satisfied that it is valuable only for the building stone that it contains.
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> Section 2319, Revised Statutes, declares all valuable mineral deposits in lands belonging to

> the United States, and the lands in which such deposits are found, to be free and open to exploitation, occupation, and purchase by citizens of the United States and those who have declared their intention to become such. That stone is a mineral, see the cases cited on pages 509 and 510, C. M. L., 2d ed.; also *Maxwell* v. *Brierly*, 1 B. L. P., 98. Section 2329 provides for the entry and patent of "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place." In the present case, as the land has been shown to "contain valuable mineral deposits," but no "veins of quartz or rock in place," I think that entry may properly be allowed as a placer claim.

The case of W. H. Hooper, decided by the Secretary of the Interior October 8, 1881 (1 L. D., 560), involved an entry made under the mining laws of lands containing valuable deposits of gypsum. In the course of his decision the Secretary said:

> Section 2318, Revised Statutes, provides that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."
>
> Section 2319 provides that:
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> "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law."

Under all authorities gypsum is a mineral, but your decision holds that it is of a similar formation to limestone, and that section 2318 only embraces such lands as contain metals or other substances which give the land greater special value than that of land containing limestone in any of its forms. Your office has, however, held (2 C. L. O., 66), in the case of Rolfe, that public lands more valuable on account of deposits of limestone and marble than for agriculture, may be patented under the mining laws; and in its circular of July 15, 1873, it held "that whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872," and as being "a valuable mineral deposit." I concur in these views.

The proceedings of the appellants appear to be regular, and there is no adverse claimant. They allege that the tract embraces a deposit of almost pure gypsum, and is not a mere limestone bed; and that they use the same as an article of commerce, and not for agriculture. I find, however, no proof as to the comparative value of the land for mineral or agricultural purposes.

I therefore direct that you cause an investigation to be made in this respect. Should it be found that it has greater value for the former than for the latter purpose, a patent should issue as applied for.

In a communication by Secretary Teller to Commissioner McFarland, dated January 30, 1883 (1 L. D., 561), relating to public lands containing valuable deposits of borax, the carbonate and nitrate of soda, sulphur, alum, asphalt, etc., the Secretary said:

> It was early determined by the Department that the act of May 10, 1872, which describes certain lands containing valuable mineral deposits, was applicable tc lands containing deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt; and I believe that from the passage of the law until the present time the definition of the term "valuable mineral deposits" has been such as to include the minerals and alkaline substances named. I understand that entries of borate lands have been allowed under the provisions of the act of 1872, and the regulations made in accordance therewith.
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> It is the desire of the persons interested that the regulations which were in existence, having special reference to the application for patent for placer claims—namely, the circular of October 31, 1881—should be continued in force so far as they relate to deposits of borax, etc., as mentioned above.
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> Believing that practical effect should be given to the mining laws of the United States, I am of the opinion that to apply the new regulations to such entries would result in excluding such lands from sale and depriving the people of the benefit of the use of these natural deposits. I therefore direct you to permit the entry of public lands containing valuable deposits of borax,

> the carbonate and nitrate of soda, sulphur, alum, and asphalt in the States of California and Nevada and the Territories of Arizona, Utah, and Wyoming—in which section of country I am informed the deposits are present—under the regulations of October 31, 1881.

In the case of *Maxwell* v. *Brierly*, decided by Secretary Teller April 16, 1883 (10 Copp's Land-Owner, p. 50), the question was whether land chiefly valuable for limestone was subject to entry under the mining laws. The Secretary, in passing upon the question, addressing the Commissioner of the General Land Office, said:

> Your decision was also prior to that of my predecessor, who held, October 8, 1881, in the case of Hooper (Copp, November, 1881), in accordance with your circular instructions of July 15, 1873, that whatever is recognized as a mineral by standard authorities, and is found in such quantity and quality as to render the land more valuable on this account than for agriculture, was "a valuable mineral deposit" within the purview of the act of May 10, 1872, and hence that gypsum and limestone so found subjected the tract to the operation of the mining laws, as has been held under other rulings, with respect to asphaltum, borax, auriterous cement, fire clay, kaolin, mica, marble, petroleum, slate, and other substances, under like conditions.
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> Concurring in these views, I am of the opinion that the tract in question is, under the testimony, more valuable for its limestone than for

agricultural purposes, and hence is subject to entry under the mineral laws.

In the case of Samuel E. Rogers, decided by Secretary Lamar December 16, 1885 (4 L. D., 284), certain locations under the placer mining laws embracing lands valuable for deposits of oil were sanctioned and sustained.

The case of Elias Jacob (7 Copp's Land-Owner, 83) is referred to by counsel for the company. That case was decided by Commissioner Williamson of the General Land Office, August 5, 1880, and was never appealed to the Secretary of the Interior. The decision is contrary to decisions in other cases, both prior and subsequent to its date. It was not approved by the Secretary of the Interior, or followed by the Commissioner of the General Land Office. It stands alone among the earlier decisions on the subject as utterly out of harmony with the principles uniformly announced in those decisions. Its doctrine was distinctly repudiated by the Secretary of the Interior in the case of W. H. Hooper, *supra*, decided about a year later.

Such are some of the rulings and decisions of the Land Department made shortly after the enactment of the mining laws by the officers of the Government charged with the administration of those laws and with the administration and adjustment of railroad and other land grants. It is submitted that as contemporaneous construction these rulings and decisions are entitled to great weight. Patents have been issued in accordance with the principles announced in them, embracing

many thousands of acres of the public lands. They have been, with the one exception stated, consistently and uniformly to the effect that the terms "mineral lands," "lands valuable for minerals," and "valuable mineral deposits," whenever used in connection with the public lands, embrace not only metallic minerals, but all valuable mineral deposits, metallic or non-metallic, wherever lands containing such deposits are shown to be more valuable on account thereof than for agricultural purposes; and that such lands are subject to disposal only under the mining laws.

The definition of the word "mineral" adopted by Commissioner Drummond in the circular of July 15, 1873, *supra*—

> That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture—

should be treated as coming within the purview of the mining laws, has been uniformly accepted as the true interpretation of said laws.

In the case of *Pennoyer* v. *McConnaughy* (140 U. S., 1, 23) this court said:

> The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of a statute by the courts, is so firmly embedded in our juris-

prudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect.

We refer in this connection to the definition of the term "mineral lands" and other kindred terms as used in the mining laws and to denote exceptions from railroad and other land grants, given by Lindley in his work on Mines (vol. 1, sec. 98, p. 116). That author says:

> While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permit us to deduce the following:
>
> The mineral character of the land is established when it is shown to have upon or within it such substance as—
>
> (*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or
>
> (*b*) Is classified as a mineral product in trade or commerce; or
>
> (*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in

trade, manufacture, the sciences, or in the mechanical or ornamental arts;

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

The same author (vol. 1, sec. 162, p. 188–189), after an extended discussion of the exception of "mineral lands" from railroad land grants, among other things, says:

We are authorized to deduce the following general conclusions from the foregoing exposition of the law:

* * * * *

(4) The term "mineral land," as used in the reservation clauses of railroad grants, includes all valuable deposits, metallic and nonmetallic, which are or may be subject to entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservation.

(5) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification belong to the public domain, and are open to exploration and purchase under the mining laws, the same as other public mineral lands.

In another part of this work (vol. 1, sec. 96, p. 113) Mr. Lindley states the following American rules of statutory interpretation as applicable to the subject under consideration:

> In addition to the ordinary canons of statutory interpretation, there are certain recognized rules applicable to the acts of Congress which are within the scope of this treatise. These may be briefly enumerated as follows:
>
> (1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States;
>
> (2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than that of the individual.
>
> (3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons.

We might add a fourth rule, deducible from the foregoing, and from the current of American authority and decisions of the land department, and that is, that the word "mineral," as used in these various acts, should be understood in its widest signification. We do not conceive that there is anything in the context of the several acts, or in their nature, to restrict its meaning. This is practically the English rule announced by Mr. Ross Stewart, which has heretofore been

referred to, and which is amply supported by the highest English authority.

Again (vol. 1, sec. 137, p. 153), Mr. Lindley says:

> In a preceding chapter, we have endeavored to establish a general definition of the term "mineral lands," as that term is used in the various mining acts of Congress; and we have also attempted to formulate definite rules of statutory construction to be applied to such acts and these terms when found therein.
>
> Thus, we have heretofore said that the word "mineral," as used in these various acts, should be understood in its widest signification, and that all substances which are classified as a mineral product in trade or commerce, or possess economic value for use in trade, manufacture, the sciences, or the arts, fall within the designation of the term "mineral." That this is true as a general rule, we have no doubt. We are firmly convinced that it should be accepted as a universal rule in dealing with the public lands.

In the case of *Conlin* v. *Kelly*, decided by the Department January 2, 1891 (12 L. D., 1), it was held that stone useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, or except it from preemption entry. This was a departure from the earlier rulings on the subject. In the decision it was stated, however, that—

> The stone in the tract in controversy has no peculiar property or characteristic that gives it

especial value, such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, auriferous cement, fire clay, kaolin, or petroleum. Its characteristic appears to be its hardness, and its value, in this particular mine, appears to be its proximity to the town of Alexandria, which has come into some prominence, having been chosen as a county seat since the entry in question was made.

It is important to be noted that soon after this decision was rendered and promulgated in printed form, the act of August 4, 1892 (27 Stat., 348), was passed, especially declaring that lands "chiefly valuable for building stone" may be entered "under the provisions of the law in relation to placer mineral claims." There can be no question that the passage of this act was the direct result of the decision in the Conlin-Kelly case. This is clearly shown by the report of the House Committee on Public Lands in support of the bill when it was pending before Congress (H. R. Report 1242, Fifty-seventh Congress, first session), wherein it was said:

> The first section in the bill as passed by the Senate is made necessary by certain recent rulings in the Interior Department which the committee calls attention to.
>
> In the case of *Rosse* v. *Wainman* (14 M. & W., 859), (same case, 2 Exch., 200, and 15 L. J., 67), it was held (quoting syllabus):
>
> "The term 'mineral' is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense beds of stone may be included in the word minerals."

So, in the case of *Micklethwait* v. *Winter*, 6 Exch., 644 (same case, 5 Eng. L. & E., 526); and *Midland R. Co.* v. *Checkley*, Law R., 4 Eq., 24, it was held that stone taken from quarries is a mineral.

The above has been the construction given the mining laws of the United States by the Interior Department since the act of 1872 was passed, until a very recent date, and even now all kinds of stone are held to be subject to mineral entry except building stone, the test applied being uniform with regard to all mineral substances, viz, whether or not the land containing such substances is more valuable therefor than for agricultural purposes. In the case of *Conlin* v. *Kelly*, decided in the Department January 2, 1891, and reported in 12 Land Decisions, 1, however, it was held that lands which contain deposits of building stone only are not subject to entry under the mining laws. This decision has brought dismay and threatened ruin and disaster to many citizens who in good faith, relying on the settled and long-continued procedure of the General Land Office, had invested large sums of money in the development of stone quarries upon the public lands, expecting to obtain patents under the mining laws. It changes what had become a recognized rule of property, and the committee think this is a matter which justly demands the action of Congress to fix the status of such lands without the possibility of doubt.

Prior to the date of the above decision the rulings had been practically uniform the other way. As early as June 28, 1875, Commissioner

Burdett, in a letter to H. C. Rolfe, said that "public lands more valuable on account of deposits of limestone and marble than for agriculture may be patented under the mining laws." (2 Copp's L. D., 66.)

This Rolfe letter was referred to with approval by Secretary Kirkwood in deciding the case of W. H. Hooper who had located a mining claim on gypsum deposits. The Secretary allowed the entry. (See 8 Copp's L. O., 120.)

In the Colorado case of *Maxwell* v. *Brierly* (10 C. L. O., 50), Secretary Teller again cited the Rolfe letter and the Hooper decision in overruling the action of the Commissioner in rejecting a placer mining claim for the land, because of its *limestone* deposits.

In the case of H. P. Bennett, jr. (11 Copp's L. O., 213), another Colorado case, Commissioner McFarland followed the decision in *Maxwell* v. *Brierly* (*supra*), and held that land valuable on account of its deposits of *building stone* (granite) is subject to entry under placer location. This decision was rendered September 18, 1884. It has been followed uniformly in the General Land Office ever since, and the records there show the patenting of hundreds of such claims. All such entries, however, are now suspended, awaiting the result of the proposed legislation.

The object of the proposed law is simply to direct that building stone be included within the definition of the term "mineral." It will not, in any manner, affect any vested rights, except to confirm such as have been established

> under the former construction of the law. No one can be injured by its passage, while great relief will be given to *bona fide* investors and claimants.

The enactment of this statute, therefore, instead of tending to show that "Congress in 1892 regarded stone as not capable of acquisition under the mining laws previously passed," as suggested by counsel for the company (p. 24 of their brief), furnishes, in the light of the conditions which led to its enactment, as shown by said report, the strongest possible evidence to the contrary. It clearly appears that Congress regarded the ruling in the Conlin-Kelly case an unwarranted departure from the construction which had been given the mining laws by the Land Department ever since their enactment, and a departure so serious in its nature and results as to demand legislative disapproval. We submit that neither the act nor the decision which caused its passage furnishes any support to the company's contention. The act does not, for the reason that the circumstances attending its passage prove beyond question that Congress believed the uniform interpretation of the mining laws prior to the decision to be correct. The decision does not, for the reason that, while holding common building stone not to be a mineral, it in effect holds limestone, marble, asphaltum, and other designated nonmetallic substances to be minerals.

In *McGlenn* v. *Wienbroeer*, decided by the Secretary of the Interior October 12, 1892 (15 L. D., 370), it was held that land principally valuable for stone is min-

eral land within the meaning of the mining laws, and subject to entry and patent under the provisions relating to placer claims. In the course of the decision (p. 373) it was said:

> From all the facts of this case, there can be no doubt but that this land was principally valuable on account of the stone which it contained. Practically, it possessed no other value, and was comparatively worthless for agricultural purposes. The question then is: Did these valuable deposits of stone render the land subject to entry under the mineral laws? In other words: Is stone a mineral within the meaning of these laws?
>
> This question has been passed upon, both by the courts and by the Department. In Copp's United States Mineral Lands, in his digest of court decisions, on page 424, several cases are cited. In that of *Rosse* v. *Wainman* (14 M. & W., 859) it was said "the term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil bodies or matters dug out of the mines; in this sense, beds of stone may be included in the word mineral." In the case of *Micklethwait* v. *Winter* (5 English Law and Equity, 526) it was said: "Stone taken from quarries is a mineral."
>
> In the case of William H. Hooper (1 L. D., 560), it was held that "whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on its account than for

> agricultural purposes, is mineral within the meaning of the mining laws." In the case of *Maxwell* v. *Brierly*, decided by Secretary Teller April 16, 1883 (10 C. L. O., 50), it was held that "land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land, and subject to sale under the mineral laws."
>
> Applying the doctrine of the last case cited, to the one at bar, and the mineral application of Wienbroeer must be allowed, while under section 2318 of the Revised Statutes of the United States, the homestead entry of McGlenn can not stand.

In this case the application for placer patent was filed prior to the act of August 4, 1892, *supra*, but the application was sustained as strictly within the provisions of the placer mining laws.

In the case of *Van Doren* v. *Plested*, decided June 9, 1893 (16 L. D., 508), it was held that land containing a deposit of sandstone suitable for building and ornamental purposes, and chiefly valuable as a stone quarry, may be entered under the placer-mining laws. In the course of its decision the Department said:

> The only question presented by the record is as to the character of the land, and the appeal does not question your findings of fact, but simply claims that you erred in deciding that the case of *Conlin* v. *Kelly* (12 L. D., 1) should control the judgment in this.
>
> The case at bar is almost exactly similar in all essential features to that of *McGlenn* v.

Wienbroeer (15 L. D., 370). The lands join; the testimony as to its character is substantially the same, in some instances the same witnesses testified in both cases. In that case a distinction was drawn between it and *Conlin* v. *Kelly* (*supra*), and it was decided that the rule in the latter could not control in this. Hence, it is only necessary to say that it was error to apply the doctrine in *Conlin* v. *Kelly* to this character of cases.

The attempt of the protestant to show that the land is valuable for agricultural purposes was, in my opinion, far from convincing. It is shown that the land is on a mesa, rising abruptly from the Purgatoire River to an altitude of about 480 feet above the river, and that the elevation of the mesa above the so-called lowlands of the tract is from 150 to 250 feet. The character of the land on each mineral location is said to be very steep bluffs at the edge of the mesa from 10 to 60 feet in height, below which is a talus of débris extending to the lowland. The perpendicular bluffs are composed of massive sandstone, in stratified layers, from 50 to 60 feet in thickness. The talus, upon which it is claimed vegetation grows, is composed of earth and stones of various sizes, chiefly, however, of decomposed sandstone lying upon shale. The estimate of the various witnesses as to the amount of land that could, under favorable circumstances, be cultivated varies from 2 acres to 60, but I think a fair preponderance of the evidence shows that it would not exceed 8. None of it has ever been culti-

vated and certain it is that it can not be without irrigation, and I am satisfied from the testimony that it is a practical impossibility to ever successfully convey water upon the tract. And I think it is proved by witnesses who have been engaged in the stock business in that vicinity for from ten to thirty years, that it possesses no value as a stock range in its present condition, and, granting that water could be found on or conveyed to it for stock to drink, I think the area that could be grazed is so small as to be wholly profitless.

On the other hand, it is indisputably shown that the sandstone is of a superior quality for building and ornamental purposes, and as such is extensively utilized, and that the land as a matter of fact is only valuable for a stone quarry. Therefore, following the rule announced in *McGlenn* v. *Wienbroeer* (*supra*), it was error in not permitting it to be patented as a placer.

This was also a case where the application for placer patent was filed prior to the act of August 4, 1892.

In the case of Piru Oil Company, decided February 13, 1893 (16 L. D., 117), an application for patent, based upon four placer locations, embracing an aggregate of nearly 640 acres of land containing valuable deposits of oil, was recognized and sustained as within the provisions of the mining laws.

In *Clark et al.* v. *Ervin*, decided February 13, 1893 (16 L. D., 122), it was held that land chiefly valuable for common building stone was not, by reason of such

fact, excluded from entry under the settlement laws. This case is something like that of *Conlin* v. *Kelly* (*supra*), and it is worthy of note that the land was shown to be worth at least $5 per acre for agricultural purposes.

The case of *Hayden* v. *Jamison*, decided June 21, 1893 (16 L. D., 537), cited by counsel for the company, has been several times before the Department. The contest was between a homestead entryman and a mineral claimant who alleged the land to be chiefly valuable for stone. The first decision was rendered September 8, 1892 (15 L. D., 276), and it was held that the homestead entry should be canceled. In a later decision (16 L. D., 537) it was stated and held as follows:

> While I find from the evidence now before me that this land is chiefly valuable for building stone, I am not satisfied that it is entirely incapable of cultivation and unfit for grazing, and, as Jamison claims that he can produce evidence of its agricultural qualities, and that he failed to do so at the hearing because he understood that question not to be in issue, I think justice will be best subserved by giving him an opportunity to do so now.
>
> I am further persuaded that this is the proper course to pursue by a letter in the record before me from the contestant, of date February 15, 1892, stating that the land embraced in the entry is very valuable ($300,000), that it contains, besides building stone, large deposits of fire clay, limestone, marble, and gypsum, and

asking that he be allowed to prove this, if the placer claim can not be sustained.

If these minerals are found in paying quantities upon the land, it is subject to entry under the mining laws, as construed by this Department, and that fact, if proven, may very materially affect the rights of the agricultural claimant.

A rehearing was thereupon had, and, upon the new proof submitted, it was held that the homestead entry should be sustained as against the contention of the mineral claimant. That decision, however, was overruled on review (26 L. D., 373) when, upon further consideration of the case in the light of the authorities on the subject, the Department sustained the mineral claim as against the homestead entry. It was there said:

Inasmuch as it is practically admitted that this land is more valuable for the red sandstone it contains than for agricultural purposes, it remains to be seen whether it was subject to disposition under the placer mining law prior to August 1, 1892. If it was, then the decision under review was error and must be vacated, for the reason that a mineral location thereof was made prior to the homestead entry of Jamison and for the further reason that if it was subject to placer location it is mineral land and title can not be acquired thereto under the homestead law if its character is known prior to the issuance of final certificate.

* * * * *

Unquestionably, the great weight of authority is to the effect that sandstone is a mineral substance.

It having been found, and not being now questioned, that the land in controversy is more valuable on account of its sandstone deposit than for agriculture, this case comes squarely within the rule above set out, and it results that the homestead entry of Jamison as to the land in conflict was and is unauthorized and can not be upheld.

In *Shepherd* v. *Bird et al.*, decided July 7, 1893 (17 L. D., 82), it was held that land containing stone suitable for making lime may be entered under either the placer mining laws or the timber and stone act of June 3, 1878 (20 Stat., 89). The Department there said:

> Under the decisions of this Department stone suitable for making lime may properly be entered as placer ground. *Maxwell* v. *Brierly* (10 C. L. O., 50); *Conlin* v. *Kelly* (12 L. D., 1). It may also be properly entered or purchased under the stone and timber act, *supra*, and I think, in considering the rights of Shepherd and Gibbons in this case, the priority of their respective claims must be considered, and the right given to him who is found first to have asserted his claim.

In *Gray* v. *Todd*, decided February 12, 1894 (18 L. D., 58), it was held that land chiefly valuable for phosphate deposits is mineral in character and subject to entry only under the placer mining laws, and that a homestead entry made with knowlege that the land embraced therein contains a valuable deposit of phosphates is illegal and must be canceled.

In the case of *Paris Gibson et al.* (21 L. D., 327) it

was held that lands valuable for ordinary building stone, embraced within entries under the placer mining laws allowed at a time when such entries were recognized under the departmental rulings, were excepted from the operation of the grant of school lands to the State of Montana by the act of February 22, 1889 (25 Stat., 676, 684). In that case the Department said:

> Inasmuch as the practice of the Land Department at the date of the mineral location herein was to allow placer entries on lands of the character herein applied for, and it appearing that these entries were made in good faith, believing the lands were subject to appropriation under the mineral laws, and it further appearing that payment has been made and final certificate issued, I am of opinion that the entries should be passed to patent.
>
> * * * * *
>
> Contemporaneously with the passage of the act of July 9, 1870 (16 Stat., 217), the Land Office held that lands chiefly valuable for building stone were mineral lands and subject to location as placer. This view was sustained by the Department (see H. P. Bennett, jr., 3 L. D., 116, and cases there cited). Parties acted under the law as then construed, and I do not intend to express the opinion that this decision was erroneous.

In the case of Union Oil Company, decided August 27, 1896 (23 L. D., 222), lands containing valuable deposits of petroleum were held not to come within

the contemplation of the mining laws, and therefore not within the exception of "mineral lands" from railroad land grants. This decision was based squarely on the proposition that under the mining laws only lands containing the precious metals were subject to location, entry, and purchase. It was a distinct departure from the long line of earlier decisions of the Department on the subject, which had been uniformly the other way. The same case came again before the Department November 6, 1897 (25 L. D., 351), upon a motion for review, seasonably filed, and which operated as a supersedeas during its pendency, and, after full consideration and discussion, the original decision was set aside and vacated. Speaking of the original decision, Lindley (vol. 1, sec. 138, p. 155) says:

> The cases of *Downey* v. *Rogers*, *Samuel E. Rogers*, *Roberts* v. *Jepson*, and *Piru Oil Company*, followed and read in the light of the antecedent practice of the Land Department, recognize petroleum as a mineral product, and lands containing it in sufficient quantities to make them more valuable for oil purposes than for any other as being mineral lands. Secretary Smith comments on these four cases and declines to accept them as tending to establish the doctrine for which we are contending.

The Secretary cites the Pennsylvania case of *Dunham* v. *Kirkpatrick*, to the effect that a reservation of "mineral" in a deed does not include petroleum, although it is admitted petroleum is technically a mineral.

This decision is in conflict with prior cases

decided in Pennsylvania, and has been practically overruled or its doctrine ignored by the same court in a later case.

The ruling of Secretary Smith as to the mineral character of petroleum is in direct opposition to a decision in the United States circuit court (ninth circuit), wherein Judge Ross, sitting as circuit judge, says:

"The premises in controversy are oil-bearing lands, the Government title to which, under existing laws, *can alone be acquired pursuant to the provisions of the mining laws relating to placer claims.*"

We think, considering the previous practice of the Land Department and its construction of the mining laws as applied to oil lands, as well as the weight of judicial decisions, Secretary Smith was in error in deciding that lands containing petroleum could not be acquired under the mining laws, but were open to selection under grants to the States.

It is important, in this connection, to refer to the act of February 11, 1897 (29 Stat., 526), wherein it was declared:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under

the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

The language of this act clearly indicates, and the report of the Public Lands Committee of the House made while the bill was pending before Congress unmistakably shows, that the act was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the original decision in the Union Oil Company case. From said report we quote as follows:

> Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past. In 1 Land Decisions, page 560, Mr. Teller, then Secretary of the Interior, said that mineral so found "subjected the tract to the operation of the mining laws, as has been held under other rulings with respect to * * * petroleum * * * and other substances under like conditions."
>
> The first patent issued by the Government under the placer-mining acts for lands containing petroleum was in the Los Angeles district, in California, mineral entry No. 18, March 22, 1880. Other entries have been made and patents issued since that time on lands containing petroleum in several of the public-land States, notably in the States of California and Wyoming.
>
> The first ruling in the matter was that contained in the letter of instructions written by Commissioner Burdett to the United States

surveyor-general of California, January 30, 1875, and was to the effect that petroleum-bearing lands were enterable under the mineral-land laws. (Copp's Land Owner, vol. 1, p. 179; Copp's Mineral Lands, second edition, p. 160.) Another letter to the same effect was written by Commissioner McFarland, March 31, 1882. (Copp's Land Owner, vol. 9, p. 51.) Under these rulings and in view of the uniform practice of the land department for many years, considerable quantities of lands have been filed upon, held, and improved for the purpose of developing oils in various of the public-land States, and in many instances large sums of money have been expended in such development.

Under a decision of the Secretary of the Interior, dated August 27, 1896, in the case of mineral entry No. 140, Los Angeles district, California, the Secretary held that lands containing oils could not be patented under the placer mining acts, for the reason that the acts did not originally contemplate the extension of their provisions to lands of this character. It has never been held by any authority that the provisions of the placer acts were not adequate to meet the conditions surrounding the development of mineral oils. The effect of the above-cited decision of August 27, 1896, is to preclude the possibility of obtaining title to lands containing oils, and as there are large areas of such lands in various of the public-land States, and as upon these lands in many instances large expenditures have already been made, and as it is manifestly for the public good that there

should be some provision whereby these lands may be held and patented, the committee believe this bill should pass.

This legislative action, taken so promptly after the departure from the earlier rulings and long-established practice with respect to oil lands, is very significant, and can hardly be regarded as less than an emphatic disapproval by Congress of the changed ruling. What has been heretofore said with reference to the act of August 4, 1892, is equally applicable here.

One other decision by the Department was based upon the proposition that only metallic minerals are within the contemplation of the exception of "mineral lands" from railroad and other land grants. That was in the case of *Tucker et al.* v. *Florida Railway and Navigation Company*, decided December 1, 1894 (19 L. D., 414), cited by counsel for the company on page 27 of their brief. The case, however, was distinctly overruled in the later case of *Pacific Marble Company* v. *Northern Pacific Railroad Company et al.* (25 L. D., 238), hereinafter to be referred to.

Speaking of the rulings of the Secretary of the Interior in the two cases of *Union Oil Company* and *Tucker et al.* v. *Florida Railway and Navigation Company*, Lindley (vol. 1, sec. 158, p. 183) says:

> The vice of the distinguished Secretary's reasoning is found in his assumption that after the passage of the railroad acts, and before title vests under them, Congress has no power to change its policy or enlarge the scope of its legislation with respect to mineral lands. That

this view is erroneous, we think we have fully demonstrated in the preceding article on the subject of grants to States for educational purposes.

In the final decision in the Union Oil Company case (25 L. D., 354) the Department, after referring to the earlier rulings on the subject of the disposal of oil lands, said:

> Such are some of the reported rulings and decisions of the Land Department, made shortly after the mineral-land laws became a part of the public-land system, and by the officers of the Government, charged with their administration. As contemporaneous and uniform interpretation, they are entitled to great consideration.
>
> From an examination of the records of your office, which I have caused to be made, it is ascertained that ever since the circular of July 15, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their deposits of petroleum, under the law and regulations relating to placer claims, has been continuous and uniform. Under this practice a large number of patents have been issued, and very large and valuable property interests have been acquired. Until the decision in this case, the correctness of the practice does not appear to have been questioned, and for that reason no case distinctly presenting such a question ever reached this Department. The case of the Piru Oil Company (16 L. D., 117) was a contest between said company as applicant for patent under the mining laws, for

several "oil mine" claims, and a homestead entryman of a part of the lands embraced in the mineral locations; but no question as to whether the lands were of the character subject to mineral entry, appears to have been discussed. The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands, subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry, is therefore not without weight. The case of *Roberts* v. *Jepson* (4 L. D., 60) was a similar contest. It was there held by Secretary Lamar that the mineral claimant had "failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws."

Sufficient has been said to show that ever since the circular of July 15, 1873, until the date of the decision under review, the practice of the Land Department has uniformly been to allow entries under the mining laws of lands containing valuable deposits of petroleum, and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. Such having been the generally accepted view for so long a time, and extensive property rights hav-

> ing been acquired under the law as thus construed by the officers of the Government whose duty it was to administer it, the demands of simple justice would seem to require that there should be no departure from that construction at this late day unless called for by the clearest evidence of error, as well as the strongest reasons of public policy.

The circular of July 15, 1873, referred to in the decision, is the circular which was issued by Commissioner Drummond, of the General Land Office (Copp's Mineral Lands, 61–62), hereinbefore mentioned and quoted from.

The case of *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company et al.*, decided by the Department September 9, 1897 (25 L. D., 233), involved the question whether lands, admittedly of great value for deposits of marble, and valuable only on account of such deposits, were within the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company, and from the school grant to the State of Washington. In that case the mining statutes of the United States, and the decisions of the Land Department and of the courts in relation to the construction of those statutes, were reviewed at length. The Department held marble to be a mineral within the meaning of the mining laws, and that lands containing valuable deposits of marble, and chiefly valuable because of such deposits, were excepted from the grant to the railroad company and from the grant to the State for school purposes. For convenience of

reference we make extensive quotations from the decision in this case. After stating the continuous and uniform interpretation given the mining laws by the Land Department for many years, it was said:

> Such are some of the rulings and decisions of the land department, made shortly after the mineral-land laws became a part of the public-land system, and by the officers of the Government charged with their administration; and as contemporaneous and uniform interpretation, they are entitled to great weight.
>
> These and other rulings on the subject, with few exceptions, have been consistently and uniformly to the effect that the mining laws embrace not only lands containing metallic minerals, but all valuable mineral deposits of whatever kind or nature—whether metalliferous or fossiliferous—wherever the lands containing them are shown to be more valuable on account thereof than for agricultural purposes. The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining laws.
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> The interpretation thus shown to have been adopted at an early date by the Land Department, and followed with practical uniformity for over twenty years, is attacked as being obnoxious to well-established rules of construction. It is insisted that the particular and specific words, "gold, silver, cinnabar, lead, tin, copper," as used in section 2320 of the Revised

Statutes, must be considered as furnishing a guide to, and placing a limitation upon, the meaning to be given the general words which immediately follow, and that in view thereof the general words must be held to include only deposits of the same kind or nature as those designated by the preceding particular words—that is, mineral deposits of the kind or nature *ejusdem generis* with gold, silver, cinnabar, lead, tin, or copper—or, in other words, metalliferous ore. The same position is taken with reference to section 2329. The specific word there is "placers." That word, it is said, should be restricted to its technical meaning—places where gold is found—and further, that the general words—"including all forms of deposit"—which follow, must be held, under the rule, to include only the different forms of placer-gold deposits.

The Department is not unaware of the well-settled rule of statutory construction upon which this contention is sought to be based, namely: That general words which follow particular and specific words of the same kind or nature, take their meaning from the particular and specific words, and are generally presumed to be restricted to the same genus as those words, and as comprehending only things of the same kind as those designated by them; but it must be remembered that this rule has its proper application only in cases where there is nothing in the statute tending to show that a wider and more comprehensive meaning was intended by the use of the general words. If, therefore, said

sections 2320 and 2329, only, were to be construed, and that, independently of anything outside of them, as though standing by themselves; or, if the act as a whole contained nothing of a nature purporting to show that the general words used in said sections were intended in a larger sense than the specific words indicate; then the present case might be considered such an one as to justify the application of the rule.

The sections named, however, are not to be construed by themselves. The whole act is to be looked to, and its general purpose ascertained, in order to properly determine the meaning of its several provisions, and the different sections are to be construed as parts of one general statute. Thus looking at the act, we find its general purpose stated in section 2319 (sec. 1, act of 1872) in the broad declaration that—

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States," etc.

It is important to observe that there is no limitation or restriction as to the kind or class of mineral deposits which are thus made subject to exploration and purchase. The invitation is to explore and purchase "all valuable mineral deposits" in the public lands, and to occupy and purchase the lands in which they may be found. Broader, or more comprehensive language could hardly have been used.

Wherever mineral deposits are found in the public lands, they are declared to be free and open to exploration and purchase, with only one qualification—they must be *valuable* mineral deposits.

Then follow certain provisions for the acquisition of title from the Government to mining claims, once discovered and properly located, whether they be "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" (sec. 2320), or whether they be "claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place" (sec. 2329).

Now, coming again to the general words "or other valuable deposits," as used in section 2329, with reference to vein or lode claims, and the words "including all forms of deposit," as used in section 2329, with reference to claims usually called "placers," and construing them in the light of the declared general purpose of the act, as a whole, as specifically indicated in sections 2318 and 2319, the conclusion seems irresistible that the general words in question, as used in both instances, depend for their meaning, not only upon the specific words which they follow, but depend also upon and draw from the larger and more comprehensive expressions—"all valuable mineral deposits," as used in section 2319, and "lands valuable for minerals," as used in section 2318. Looking, then, to both the sources stated for the guide to the meaning of the general words, the further conclusion seems equally

irresistible that in the first instance (sec. 2320) they were intended to include other valuable mineral deposits, of whatever kind, if in the form of *veins* or *lodes* of *quartz*, or other *rock in place*, while in the second (sec. 2329) they were intended to include all forms of mineral deposit, of whatever kind or nature—whether metallic or otherwise—excepting *veins* of *quartz* or other *rock in place*.

Such seems to be a fair and reasonable construction of the sections in question, and in my judgment is the only one that accords with the manifest purpose of the act as a whole, which was, as we have seen, the adoption of a general scheme or system for the development of the mineral resources of the country. The larger and more comprehensive provisions of both sections 2318 and 2319 must be given reasonable effect and operation—they can not be ignored—and the Department is not aware of any rule of construction requiring that the specific designations used in the succeeding sections shall operate to restrict or limit the meaning and effect of such larger provisions. Furthermore, if the rule of *ejusdem generis* were held to apply, and the construction contended for adopted, the result would be equivalent to saying that Congress, after having declared that "all valuable mineral deposits" in the public lands, without reservation or restriction as to kind or nature, shall be free and open to exploration and *purchase*, has provided a means for the purchase only of a certain class (the metallic) of such valuable mineral deposits. Such a construction would

reduce the statute to an absurdity. This would furnish a sufficient reason for its rejection if there were no other.

Ever since the enactment of the mining laws, however, as has been shown, the construction by the Land Department, with practical uniformity, has been the other way. The more liberal view was early adopted and has since prevailed to the extent that many titles to lands patented as mineral, though of the nonmetallic class, are now depending upon it. This view having been generally accepted for so long a time, and property rights having grown up under it, there should be, in my judgment, the clearest evidence of error, as well as very strong reasons of policy and justice controlling, before there should be a departure from it.

* * * * *

Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late day. Independently of these things, however, it may be added that the construction, as an original proposition, appears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:

That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

The lands here involved being admittedly of great value for the deposits of marble they contain, and valuable only on account thereof, are clearly within the meaning of the rule thus laid down, and must therefore be held subject to entry under the mining laws, unless it be held that mineral lands of such character are not within the exceptions from the railroad and State grants in question.

This brings us to the other phase of the contention: That the determination or classification of lands as mineral within the meaning of the mining laws, does not furnish a guide for the classification of lands as mineral within the meaning of the excepting clause of the grant of July 2, 1864; in view whereof it is insisted that though lands chiefly valuable for minerals of the class other than metallic may be subject to entry in some instances under the mining laws, yet no lands but those containing the metalliferous minerals can be held to come within the meaning of the exception from said grant.

At the very threshold of the discussion of this branch of the case, we are met by the aforesaid act of July 1, 1864, passed the day before the grant to the railroad company was made, wherein it was declared that coal—a nonmetallic mineral—is within the exception of mineral lands in the preemption act of 1841, and with the case of *Mullan* v. *United States* (*supra*), holding that this was a legislative declaration to the effect that coal lands are mineral lands within the meaning of that term

as used in statutes regulating the public lands, unless a contrary intention is clearly manifest. This legislative intrepretation of the word "mines," used in the preemption act, as including nonmetallic minerals, given the day before the grant to the railroad company was made, is very significant, and would seem to negative all idea that Congress intended by the use, the next day, of the term "mineral lands," in said grant, to include thereby only lands containing the metalliferous minerals. The larger and more comprehensive meaning would seem clearly to have been intended, in the absence of anything plainly manifesting a contrary purpose.

Again, the proviso in the excepting clause of the company's grant, that the word "mineral," when used in the act, shall not be held to include *coal* and iron, clearly shows the mind of Congress on the subject. If the purpose had been to except from the grant only lands valuable for metalliferous minerals, there would have been no necessity for said proviso as to coal; and if the exception of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception coextensive with the grant, is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean: chiefly valu-

able for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes. There is nothing in the act making the grant to this company, nor in any contemporary legislation on the subject of which the Department is aware, that clearly manifests an intention on the part of Congress to restrict or limit the meaning of the term "mineral lands," as used in said grant to metalliferous minerals only. The same may be said of the grant to the State.

In the act of February 26, 1895 (28 Stat., 684), which provided for the examination and classification, in the States of Montana and Idaho, of mineral lands within the limits of the company's grant, but excepted therefrom on account of their mineral character, it was declared (section 3):

"That all lands shall be classified as mineral which, by reason of valuable mineral deposits, are open to exploration, occupation, and purchase under the provisions of the United States mining laws."

The act also contains the proviso that the word "mineral" shall not be held to include coal and iron, the same as in the original grant. Here we have what appears to be a subsequent legislative interpretation of the meaning of the exception of "mineral lands" from the company's grant. It is, in effect, that all lands which by reason of valuable mineral deposits are open to exploration, occupation, and purchase, under the provisions of the mining laws, shall be classified as "mineral lands" within the meaning of said exception—not including, of

course, coal and iron. In view of this interpretation, it seems plain that in the mind of Congress the term "mineral lands," as used in said grant, is the equivalent of the terms "lands valuable for minerals" and "all valuable mineral deposits," as used in the mining statutes. This interpretation is in entire harmony with the contemporaneous and long-continued construction by the Land Department.

The case of *Tucker* v. *Florida Railway and Navigation Company* (19 L. D., 414) is cited and relied on as holding the contrary view. In that case the Department, after referring to the exception of mineral lands from the grants made during the year 1864, and subsequently thereto, and the provision that the word "mineral" as therein used should not include coal and iron, further said:

"It would seem, therefore, that the word 'mineral' is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word 'mineral' as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar, and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state of advancement of science which makes known its uses."

The selections authorized by the act of June 22, 1874, were of "lands not mineral"—prac-

tically the same exception as that contained in the Northern Pacific grant. The theory upon which the decision seems to be based is, in part at least, that the express exclusion of coal and iron from the mineral exception in the grants of 1864, and subsequent grants, is an indication that the word mineral was used by Congress in a restricted or limited, and not in its broader sense. It does not appear to me that this theory can be sustained. Indeed, it would seem that exactly the opposite view is supported by sound reasoning. The very fact that the express exclusion of coal—a nonmetallic mineral—from the exception of mineral lands, was necessary in order to exclude it, shows that the word mineral was not used in its limited sense, and that it was used in that broader sense which includes all mineral deposits of whatever kind or nature. There does not appear to be any reasonable question of the soundness of this view, and it is in exact accord with the legislative interpretation shown by the act of February 26, 1895, which was passed after the decision in the Tucker case.

The further argument that the word was not used in its broader sense for the reason that the greater part of the earth contains mineral in some form, has been already answered in the statement that under the law, in all cases, the land must not only contain mineral, but must be chiefly valuable on account of its mineral.

In view of what has been said on this point, the Department is of the opinion and decides:

That lands containing valuable mineral deposits, whether of the metalliferous or fossilifer-

ous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

The following are some of the more important cases decided by the Department since the decision in the Pacific Coast Marble Company case:

In *Alldritt* v. *Northern Pacific R. R. Co.* (25 L. D., 349) it was held that lands chiefly valuable for deposits of fire clay are subject to location and entry under the mining laws and are included within the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company.

In the case of *Florida Central and Peninsular R. R. Co.* (26 L. D., 60) it was held that lands chiefly valuable for phosphate deposits are mineral lands within the intent and meaning of the laws relating to the disposal of the public domain, and as such did not pass under the grant of May 17, 1856 (11 Stat., 15), to the State of Florida, to aid in the construction of certain railroads.

In *Richter et al.* v. *State of Utah* (27 L. D., 95) guano was held to be a mineral, and lands chiefly valuable for deposits thereof to be "mineral lands" within the meaning of the mining and other laws of the United States, and therefore not subject to selection by the State of Utah under the act of July 16, 1894 (28 Stat., 109),

making a grant to the State for the use of agricultural colleges.

In *McGuiddy et al.* v. *State of California* (29 L. D., 181) it was held that lands chiefly valuable for gypsum and petroleum deposits can only be disposed of under the laws governing the sale of mineral lands, and are therefore not subject to school indemnity selection.

In the case of *Tulare Oil and Mining Company* v. *Southern Pacific R. R. Co.* (29 L. D., 269) it was held that lands chiefly valuable for deposits of asphaltum are not subject to selection as indemnity under a railroad land grant from which "mineral lands" are excepted.

In the case of *Beaudette* v. *Northern Pacific R. R. Co.* (29 L. D., 248) it was held that land valuable for deposits of sandstone, and more valuable for such deposits than for agricultural purposes, are mineral in character and must be so classified under the act of February 26, 1895 (28 Stat., 683), relating to the classification of lands within the limits of the grant to the Northern Pacific Railroad Company. In that case it was said:

> The evidence shows that the land in controversy was located as a placer mine as alleged in the protest; that it contains a very large deposit of sandstone suitable for building purposes; that a quarry has been opened thereon and is being operated; that large quantities of dimension stone are being shipped therefrom to the adjacent city of Anaconda, and that it has

been used in the erection of ten or twelve buildings in that place; that this stone will sustain a pressure of 3,125 pounds to the square inch, and that it is worth between 25 and 35 cents per cubic foot as it comes from the quarry; that the land is quite valuable on account of this deposit of sandstone, and that it is of little or no value for agricultural purposes.

In the case of *Hayden* v. *Jamison* (on review, 26 L. D., 373), it was held that sandstone is a mineral substance, and that land more valuable on account of the sandstone it contains than for agricultural purposes is mineral in character and subject to disposition under the mineral laws.

It appearing that the land in controversy is of vastly more value on account of the sandstone it contains than for agricultural purposes, it results that the classification thereof made by said commissioners is wrong, that the land, although part of an odd-numbered section within the primary limits of the grant to the Northern Pacific Railroad Company, did not pass under said grant, and that said classification can not be upheld, nor the contention of said company that it is not mineral land within the meaning of the excepting clause of said grant be sustained.

In the case of *Schrimpf et al.* v. *Northern Pacific R. R. Co. et al.* (29 L. D., 327) it was held that land principally valuable for deposits of marble and slate are mineral in character and within the meaning of the excepting clause in the grant to the Northern Pacific

Railroad Company, and therefore not subject to indemnity selection under said grant. It was said in that case:

> Marble and slate are mineral substances, and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws, and within the meaning of the excepting clause of the grant to the Northern Pacific Railroad Company, and therefore not subject to indemnity selection on account of said grant.

In the case of *Morrill* v. *Northern Pacific R. R. Co. et al.* (30 L. D., 475) it was held that lands valuable on account of limestone deposits contained therein, and more valuable on account of such deposits than for agricultural purposes, are "mineral lands" within the meaning of the mining laws, and are therefore "mineral lands" within the meaning of the act of February 26, 1895, providing for the classification of lands within the limits of the Northern Pacific Railroad grant. In that case, after referring to the case of the *Pacific Coast Marble Company* v. *Northern Pacific R. R. Co. et al.* (*supra*), and certain other authorities, it was said:

> As early as the year 1883, in the case of *Maxwell* v. *Brierly* (10 C. L. O., 50), it was held by the Department that lands more valuable for deposits of limestone than for agricultural purposes are mineral lands and subject to disposition under the mining laws. That case was referred

to and the doctrine thereof approved in the Pacific Coast Marble Company case, *supra*.

It can not be questioned that limestone is a mineral substance, and as the testimony shows that the lands in controversy have an actual value for the deposits of limestone contained therein, and are more valuable on account of such deposits than for agricultural purposes, they fall clearly within the rule announced in the authorities cited, and are accordingly held to be mineral lands within the meaning of the United States mining laws. It follows that they are also mineral lands within the meaning of the classification act of February 26, 1895, and were improperly classed as nonmineral.

In this long line of departmental decisions, excepting only the cases of Union Oil Company (23 L. D., 222), and Tucker v. *Florida Railway and Navigation Co. (19 L. D., 414), it has been continuously and uniformly held that lands valuable for minerals, whether of the metallic or nonmetallic class, are subject to location, entry, and purchase under the provisions of the mining laws, and are also within the exception of "mineral lands" from railroad land grants. The only cases wherein the contrary proposition has been announced are the two cases just referred to, both of which were overruled within a very short time after they were rendered, and neither has ever been followed in other cases.*

The cases of Conlin v. *Kelly and Clark* v. *Ervin, while differing from the general line of decisions in that common building stone was in each held not to be mineral within the mining laws, both recognize the principle that lands containing valuable deposits of nonmetalliferous as well as*

metalliferous minerals, are subject to entry under the mining laws. The doctrine announced in these two cases as to building stone was distinctly repudiated by Congress in the passage of the act of August 4, 1892. It is perfectly clear that the passage of that act and the passage of the act of February 11, 1897, with respect to oil lands, were brought about, not because it was believed by Congress that building stone and oil deposits were not within the purview of the mining laws, but because the decisions which rendered the acts necessary were distinct departures from the former uniform rulings and adjudications of the Land Department with respect to the substances mentioned. It is submitted that the passage of these two acts, viewed in connection with the attendant circumstances, as shown by reports of the Committee on Public Lands of the House of Representatives, above referred to, furnish the strongest possible evidence that in the mind of Congress it had never been contemplated that the mining laws should be restricted in their operation to embrace only minerals of the metallic class. Decisions of the Land Department holding the contrary view date back as far as the year 1875, and have been practically uniform ever since. If it had been thought by Congress that these decisions were contrary to what was intended should be the interpretation of the mining laws, it would have been an easy matter to have enacted corrective legislation on the subject. We find no such legislation on the statute books.

In *United States* v. *Moore* (95 U. S., 760, 763) this court held:

> The construction given to a statute by those charged with the duty of executing it is always

entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *MacDaniel*, 7 Id., 1.)

From *Brown* v. *United States* (113 U. S., 568, 571) we quote as follows:

> In *Edwards* v. *Darby* (12 Wheat., 206), it was said by this court that "in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect." This case is cited upon this point with approval in *Atkins* v. *Disintegrating Co.* (18 Wall., 272, 301); *Smythe* v. *Fiske* (23 Wall., 374, 382); *United States* v. *Pugh* (99 U. S., 265); and in *United States* v. *Moore* (95 U. S., 760, 763). In the case last mentioned the court said that "the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret." And in the case of *United States* v. *Pugh*, the court said: "While, therefore, the question," the construction of the abandoned and captured property act, "is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of

> Claims and the Executive for so long a time." See also *United States* v. *State Bank of North Carolina* (6 Pet., 29); *United States* v. *Alexander* (12 Wall., 177); *Peabody* v. *Stark* (16 Wall., 240); and *Hahn* v. *United States* (107 U. S., 402).
>
> These authorities justify us in adhering to the construction of the law under consideration adopted by the Executive Department of the Government. * * *

In *Robertson* v. *Downing* (127 U. S., 607, 613), this court, speaking of the construction given by the Treasury Department to certain acts of Congress, said:

> This construction of the Department has been followed for many years, without any attempt of Congress to change it, and without any attempt, so far as we are advised, of any other Department of the Government to question its correctness, except in the present instance. The regulation of a Department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

In volume 23, American and English Encyclopedia of Law, first edition, page 342, it is said, on the subject of long-continued construction of a doubtful statute, as follows:

> This rule of usage followed in the interpretation of a statute has been said to apply only to

> cases where the language is ambiguous; where it is plain and unambiguous, it is said that a practical construction in conflict with it must be corrected. But if the legislature by its inaction has long sanctioned a certain construction, language apparently unambiguous may be given by the courts such construction, especially if the usage has been public and authoritative. The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief, or where property rights would be disturbed.

See also, on the same subject, *United States* v. *Graham* (110 U. S., 219); *United States* v. *Philbrick*, (120 Id., 52); *Barden* v. *Northern Pacific Railroad Company*, (154 Id., 288); and *Pennoyer* v. *McConnaughy* (140 U. S., 1, 23).

These authorities are especially applicable to the present case, and we submit should be regarded as of controlling weight in support of the construction given to the term "mineral lands" and other kindred terms used in the mining laws and in railroad and other land grants by the officers charged with the administration of those laws and grants. Especially should this be so in view of the fact that the decisions on the subject by such officers for nearly thirty years have been practically uniform, and under them property rights of immense value have been acquired, which would become wholly unsettled by a changed ruling.

We recur to the act of February 26, 1895 (28 Stat., 684), which provides for the classification of lands

within the limits of the Northern Pacific grant in the States of Idaho and Montana. In the third section of that act it is declared:

> That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws. * * * *Provided*, That the word "mineral" where it occurs in this act shall not be held to include iron or coal.

This act was passed in full view of the long line of decisions by the Land Department in which the mining laws had been interpreted as authorizing the exploration, occupation, and purchase of lands containing valuable deposits of mica, marble, gypsum, limestone, building stone, granite, asphaltum, and many other nonmetallic substances. It is a clear legislative declaration that no lands which are subject to entry and purchase under the mining laws shall be considered as within the grant to the railroad company. The plain and unmistakable inference is that Congress held the view that no rights had passed to the railroad company under its grant which could in any wise restrict the full operation of the mining laws within the limits of the grant as those laws had been interpreted from their earliest history to the date of the act. How can it be reasonably contended, in view of this unmistakable legislative construction of the exception of "mineral lands" from the Northern Pacific grant, that such exception embraces only minerals of the metallic class?

Congress, at the time of the passage of this classification act, must be presumed to have been cognizant of the former uniform interpretation of the mining laws by the Land Department. The circumstances which led to the passage of the prior act of August 4, 1892, as to building stone, conclusively show that Congress was fully aware of such former interpretation. If it had been deemed that such interpretation was wrong Congress would not have provided for the classification as mineral of all lands which, by reason of valuable mineral deposits are subject to exploration, occupation, and purchase under the provisions of the mining laws. It seems clear that Congress accepted the interpretation of the mining laws theretofore given by the Land Department, and meant that such interpretation should be applied in the classification of lands as provided in the act. Emphasis is given to this view by the provisions (sections 5 and 6) for the determination, *by the Land Department*, of protests and other controversies relating to the character of the lands classified. All such controversies were to be determined under rules and regulations as near as practicable in conformity with the rules and practice in contests involving the mineral or nonmineral character of lands in other cases. The classification was to be approved by the Secretary of the Interior before becoming final. In the administration of the act the Land Department has applied the same rules in the determination of contests involving the mineral or nonmineral character of lands classified under it as have

been applied in the determination of like contests in other cases. *Holter et al.* v. *Northern Pacific Railroad Company*, 30 L. D., 442, 448–449.)

It is an established principle of statutory construction that the legislative branch of the Government is presumed to be cognizant of the construction given to a statute by public officers whose duty it is to execute it, and that after long continuance of such construction, without legislative dissent, courts will adopt it. In Sutherland on Statutory Construction (sec. 309) it is said:

> The practical construction given to a doubtful statute by the public officers of the State, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt. This is similar in effect to a course of judicial decisions. The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. Contemporary construction and official usage for a long period by the persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes.

See also Black on Interpretation of Laws (pp. 215–216); Endlich on Interpretation of Statutes (sec. 360).

There has been no legislative dissent from the long-continued construction of the mining laws here under consideration. As before shown, the only instances of legislative interposition which have occurred have been

where Congress promptly interposed its emphatic dissent from a changed or contrary construction.

It is stated in the oral argument, in substance, that lands containing valuable deposits of stone, and chiefly valuable on account thereof, have been, with the approval of the Land Department, classified, under the act of February 26, 1895, as nonmineral lands within the meaning of the grant to this company. This, however, is a mistake, as is shown by the cases referred to, where it was held that under this act such lands should be classified as mineral lands. (*Beaudette* v. *Northern Pacific Railroad Company*, 29 L. D., 248; *Morrill* v. *Northern Pacific Railroad Company et al.*, 30 L. D., 475.) No contrary classifications have been sanctioned by the Department.

The act of July 1, 1898 (30 Stat., 597, 620), is referred to by counsel for the company. This act provides a means whereby the Northern Pacific Company may relinquish lands in contest between it and settlers and select other lands of equal area elsewhere. It contains a proviso that the company—

> shall not be bound to relinquish lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal.

It is contended that because of the use of the word "stone" in the proviso, the act should be considered a legislative interpretation, by implication, that lands valuable for stone were subject to the grant and passed under it. We submit that this contention can not be

sustained. It is contrary to the principle universally accepted as to grants of a public nature, such as the one here under consideration, that nothing passes by implication, and that in the clear and explicit language of the grant must be found all that is conveyed by it; that when doubt arises the grant must be construed most strictly against the grantee, the rule being in such cases that nothing passes under the grant except that which is clearly given.

In *Dubuque and Pacific R. R. Co.* v. *Litchfield* (23 How., 66, 88) it was held by this court, speaking of a grant made to the Territory of Iowa to aid in the improvement of the Des Moines River, that—

> All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and, if not thus expressed, they cannot be implied.

In *Slidell* v. *Grandjean* (111 U. S., 412, 437) this court said:

> It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government

> rather than that of the individual. Nothing can be inferred against the State. * * *
>
> The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 536; *Dubuque and Pacific Railroad Company* v. *Litchfield*, 23 How., 66, 88; *The Delaware Railroad Tax*, 18 Wall., 206.) The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.

See, also, *Barden* v. *Central Pacific Railroad Company* (154 U. S., 288); *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733, 739–740).

Again, in view of the act of February 26, 1895, containing a clear and unequivocal declaration that all lands subject to exploration and purchase under the mining laws shall be classified as mineral lands within the meaning of the grant here under consideration, and in view of the long line of decisions prior to that act, holding that lands valuable for *stone* and other non-metalliferous substances were subject to exploration and purchase under the mining laws, the use of the word "stone" in the act of 1898, we submit, can not be accepted, even independently of the authorities above cited, as of any material consequence in the decision of this case. While it may be difficult to understand why the word "stone" was used in the act, except upon the

theory that *stone* lands were considered as within the contemplation of the company's grant, it is equally difficult to understand why it was provided that the company should not be bound to relinquish lands which it had *sold* or *contracted* to sell. How could it relinquish lands which it had already disposed of? In this respect the act is equally, if not more, ambiguous than with respect to the use of the word "stone."

The Department has not considered this act as intended by Congress to be an interpretation of the company's grant. In the case of *Schrimpf et al.* v. *Northern Pacific R. R. Co. et al.* (29 L. D., 327–328), speaking of the act, the Department said:

> It does not appear how this act can affect the question presented in this case, nor why it is cited, unless to show that Congress was of opinion that "stone" lands are not embraced in the term mineral lands. A conclusion that such views were entertained by Congress does not necessarily follow from the language used in said act.

What has been said of the controlling effect of the legislative construction placed upon the company's grant by the act of February 26, 1895, by the declaration that all lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the mining laws, as against any possible inference from the use of the word *stone* in the act of July 1, 1898, is applicable with equal force as against the company's contention with respect to the provision in section 2 of the

granting act giving the right and authority to take from the public lands adjacent to the line of the road "materials of earth, stone, timber, and so forth" for *purposes of construction*. We submit that this provision, applying to the even as well as the odd sections, and relating to materials for construction purposes only, can not be regarded as indicative of an intention on the part of Congress that lands chiefly valuable for deposits of stone should be carried by the grant.

The act of June 3, 1878 (20 Stat., 89), provides for the sale of certain lands valuable chiefly for timber and unfit for cultivation. It also provides that "lands chiefly valuable for stone may be sold on the same terms as timber lands." Counsel for the company contend that this act is equivalent to a declaration by Congress that the disposal of stone lands was not contemplated by the acts of 1867, 1870, and 1872—the general mining laws. In the proviso to the act it is declared that nothing therein contained shall "authorize the sale of any mining claim." Prior to its passage it had been the continuous and uniform practice of the land department to allow the location, entry, and patent of lands containing valuable deposits of *stone* under the placer mining laws. This, Congress is presumed to have known, and in view thereof the act, containing a proviso that nothing in it shall "authorize the sale of any mining claim," is rather a recognition on the part of Congress that stone lands were subject to exploration and occupation under the mining laws; else why the proviso? Surely, the act furnishes

no support to the contention by the company. Since it was passed the practice of the Department has been to allow the disposal of lands containing valuable deposits of stone under it and under the mining laws also, the priority of right being in such cases determined by the priority of the initiation of the claim. *Shepherd* v. *Bird et al.* (17 L. D., 82); *Forsythe et al.* v. *Weingart* (27 L. D., 680); *The Manners Construction Co.* v *Rees* (31 L. D., 408).

We submit that neither the act of June 3, 1878, nor the act of August 4, 1892, can be regarded as a declaration on the part of Congress that prior to the latter act lands containing valuable deposits of stone were not subject to disposal under the mining laws in relation to placer claims.

It was also stated in the oral argument, in substance, that the Land Department always allowed lands valuable for stone to be entered under the preemption law, prior to its repeal. This is a mistake. No reported decision of the Interior Department holds that lands containing valuable deposits of stone suitable for building or other purposes, and chiefly valuable on account of such deposits, may be taken under the preemption law. After the enactment of the mining laws and prior to the decision in the Conlin-Kelly case the practice was continuous and uniform to allow the disposal of lands chiefly valuable for building stone only under the mining laws. We have found no decision where that rule was departed from prior to the Conlin-Kelly case.

In the recent case of *King et al.* v. *Bradford* (31 L. D., 108) it was held that lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes. This ruling is referred to by counsel for the company (p. 31 of their brief), and it is suggested that it is inconsistent with former rulings of the Department holding fire clay or kaolin to be a mineral within the meaning of the mining laws. *We submit there is no such inconsistency. The decisions of the Department on the subject of common brick clay have been uniformly to the effect that such clay is not a mineral. The distinction has been clearly drawn between the common or ordinary brick clays of the country and clays useful and valuable for the manufacture of fire brick. The latter have been always treated as mineral, while the former have never been.* No standard authority recognizes common or ordinary brick clay as mineral, while kaolin, or fire clay, is so classified. The first case involving common brick clay was that of Dunluce Placer Mine (6 L. D., 761). This was followed by the case of the Blake Placer, decided January 18, 1889 (unreported), and the later case of *Jordan* v. *Idaho Aluminum Mining and Manufacturing Company* (20 L. D., 500), and finally by the King case above referred to. The rulings in all the cases have been to the effect that clays useful only for the manufacture of common brick are not mineral within the meaning of the mining laws. In *King et al.* v. *Bradford*, the Depart-

ment, after referring to the former rulings, states the underlying principle as follows:

> The contention that the rulings above referred to are antagonistic to later decisions and that the Department has practically overruled the cases wherein they were made, is not supported by the citations in the brief of counsel, as an examination will disclose. The cases referred to are *Pacific Coast Marble Co.* v. *Northern Pacific Railroad Co.* (25 L. D., 233); *Phifer* v. *Heaton* (27 L. D., 57); and *Richter et al.* v. *State of Utah* (27 L. D., 95). In the first case it was held that lands chiefly valuable for deposits of marble are mineral in character; in the second, that lands containing a deposit of gypsum cement, and more valuable on that account than for agricultural purposes, are not subject to agricultural entry; and in the third, that lands wherein exist valuable deposits of guano are subject to entry as mineral land.
>
> The distinction between the cases containing the rulings complained of and those cited by counsel as sustaining protestants' contention, is plainly apparent. Deposits, such as marble, gypsum cement, and guano, are classed by standard authorities on mining matters as mineral. On the other hand, no standard authority has been cited, nor has any been found, which in direct terms says that ordinary brick clay is mineral, while it is a well-known fact that such clay exists generally throughout the entire country, in quantities more or less varying, and that the lands where found, as a rule, are valuable for agricultural purposes.

It should be stated in this connection that the common rock of the country, sand and gravel beds, etc., referred to in the argument by counsel, are not and never have been regarded by the Land Department as mineral substances within the meaning of the mining laws. The rule has universally been that to render lands containing mineral deposits subject to disposal under the mining laws, and to bring them within the exception of "mineral lands" from railroad and other land grants, they must be *valuable* on account of such deposits, and more *valuable* on such account than for agricultural or other purposes for which lands are commonly used. As was said in the case of *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company* (*supra*):

> The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law.

The argument indulged in to some extent, that the term "mineral lands," as used in the exception from the grant to this company, can not be considered in its broader sense, for the reason that the greater part of the earth contains mineral in some form, and that to so construe the term would in effect destroy the grant, finds its answer in the fact that the criterion of value is always applied in determining whether lands are mineral in character. To be classified as mineral, the lands must contain valuable mineral deposits, and they must be chiefly valuable on account of such deposits. These two elements have always been

regarded as essential. Where either is wanting, the lands can not be classed as mineral lands. There is nothing, therefore, in the suggestion that should the court hold that the deposit of granite in the lands here in question is a mineral within the meaning of the exception from the company's grant, the barren rocks of the mountains would also be excepted from the grant, and the company would receive in lieu thereof valuable agricultural lands. Upon this question the officers of the Land Department are charged with the duty of safeguarding the best interests of the Government and the solicitude of counsel for the railroad company is somewhat gratuitous. The railroad company may rightfully be regarded as taking a position in this suit which is in keeping with and not antagonistic to its pecuniary interests.

If the land involved in this case is of less value, notwithstanding the deposit of granite contained therein, than agricultural land, why the contention by the company, as against the claim of the Government, that the land passed to it under its grant?

The criterion of *value* has also been recognized by this court as the means of determining whether lands containing mineral deposits are within the meaning of the mining laws. Speaking on this subject, in *Deffeback* v. *Hawke* (115 U. S., 392, 404), this court said:

> We say "land known at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in

> the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and reenacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "valuable mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase.

See also the case of *Davis's Administrator* v. *Weibold* (139 U. S., 507, 517–518).

Sections 2319, 2320, and 2329, Revised Statutes, all use the word "deposit." This word, when applied to mining, is defined by Webster to be "a natural occurrence of a useful mineral under conditions to invite exploitation." Granite, petroleum, mica, asphaltum, and other nonmetallic minerals are easily within this description, especially since section 2329, by employing the phrase "including all forms of deposit," shows a clear purpose to use the word in a broad and liberal sense.

As early as November 23, 1882 (*Montague* v. *Dobbs*, 9 Copp's Land Owner, p. 165), it was stated and held as follows:

> The common understanding of the term "placer" is deposits of débris or wash here and

> there upon the earth's surface, *valuable* as a "placer" deposit because carrying gold; but Congress has enlarged upon the common understanding of the term, and included all deposits, excepting quartz or other rock in place. Section 2329 provides: "Claims usually called 'placers,' including all forms of deposit, with the exception just mentioned, shall be subject to entry and patent, under like circumstances, conditions, and proceedings as are provided for vein or lode claims."

This broad signification given to section 2329, which was early adopted by the Land Department, has been continuously applied ever since. Immense property interests have grown up under it. To restrict the construction at this late day to embrace only deposits of the character within the technical meaning of the term "placer"—in other words, to embrace only gold deposits other than those in rock in place—would not only be contrary to the accepted and uniform construction for nearly thirty years, acquiesced in by Congress, and especially ratified and adopted with respect to the Northern Pacific grant by the act of February 26, 1895, but would be unspeakably disastrous in its results.

We refer to certain decisions of the courts bearing upon the question.

In the case of *Gird et al.* v. *California Oil Company* (60 Fed. Rep., 531–532), it was said:

> The premises in controversy are oil-bearing lands, the Government title to which under existing laws, can only be acquired pursuant to

> the provisions of the mining laws relating to placer claims.

This case was decided prior to the passage of the petroleum act of February 11, 1897.

In *Freezer et al.* v. *Sweeney*, decided by the supreme court of Montana February 2, 1889 (21 Pac. Rep., 20), the question was whether lands containing a valuable *stone quarry* were subject to location and purchase under the placer mining laws. The answer was in the affirmative. In the course of its decision, the court said:

> The question is an interesting one, and we have not been referred to, nor have we found, any direct adjudication on the subject; but the Commissioner of the Land Office, in the case of *Montague* v. *Dobbs* (9 Copp. Land Owner, 165), and also in the application made for a patent by P. H. Bennett, reported in 3 Pub. Land Laws, 116, held that land containing layers or deposits of kaoline, and quarries of stone valuable for building purposes, could be located as placer claims under the provisions of section 2329 of the Revised Statutes of the United States. * * * This section extends and enlarges the signification commonly given to "placer claims," and makes such locations include all forms of deposit, excepting quartz veins or other rocks in place. The officers of the land department have construed it as embracing quarries of rock valuable for building purposes, as already stated, and we do not doubt the correctness of this construction.

The case of *Wheeler et al.* v. *Smith*, decided by the supreme court of Washington, February 8, 1893 (32 Pac. Rep., 784), involved the question whether land containing a deposit of limestone could be located and held as a placer mining claim, and it was held it could not. It was there said by the court:

> In our judgment, a mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws of the United States unless it contains some of the metals for which mining works are prosecuted.

This is the only case where a court in any of the public-land States has announced such a proposition, so far as the reported cases show. In speaking of the case, Mr. Lindley, in his work on Mines (vol. 1, sec. 97, p. 114), after having stated that the current of American authority and the decisions of the Land Department were to the effect that the word "mineral," as used in the various acts of Congress in connection with the public lands, should be understood in its widest signification, said:

> We regret that this last-suggested rule is in conflict with the decision of the supreme court of the State of Washington (in the case of *Wheeler* v. *Smith*), wherein that court seeks to limit the meaning of the term "mineral," as used in the Congressional mining laws, to *metallic* substances. In so doing the court treats the rulings of the land department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the supreme court of Montana, a court noted

> for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the supreme court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term "mineral."

It is to be observed that the supreme court of Washington, in the case of *Johnson* v. *Harrington* (31 Pac. Rep., 316), decided less than six months prior to *Wheeler* v. *Smith*, held exactly to the contrary of the views expressed in the latter case. The court there said:

> That stone is a mineral will hardly be disputed. (See Copp, U. S. Min. Dec., 2d ed., p. 510.) It has been recognized as such by the duly authorized department of the Government; and entries of land containing valuable deposits of building stone or limestone are permitted as "placer claims," under sections 2319 and 2329 of the Revised Statutes of the United States, which relate to the entry and patent of mining claims. (See 3 Dec. Dep. Int., p. 116; 1 Dec. Dep. Int., p. 560.)

In the case of *Johnstone and others* v. *Crompton Co., Lim.* (English Law Jour. Rpts., 1899, vol. 68, p. 559), it was held that an exception or reservation of "mines and minerals," contained in a lease of lands, includes all substances otherwise falling under the definition of minerals which have a use and value of their own,

either for the purpose of sale or for other purposes, independently of and separably from the use of the rest of the soil. In that case, among other things, it was said:

> I understand the rule to be this: You inquire what the substances are; then you see whether these are minerals, in the sense that they belong to a class of substances, or form a class or kind of substance of which it can be said that that substance is a valuable article, either for the purpose of sale or for other purposes.

In the case of *Armstrong* v. *Granite Company* (147 N. Y., 495) the question was whether granite is a mineral within the meaning of a reservation of "minerals and ores" used in a deed of conveyance. In the decision by the court of appeals of the State of New York it was stated and held:

> The question of what are minerals within a grant or reservation of mines and minerals has been frequently considered by the English courts, and the almost uniform conclusion has been that the word includes not only metals and metal-bearing rock, but anything in character which can be got by mining. In one of the cases (*Earl of Rosse* v. *Wainman*, 14 M. and W., 859), which was affirmed (2 Exch, 800), the question arose under a reservation to the lord of the manor, in an inclosure act, of "all mines and minerals" lying within or under the common or waste lands, inclosed by the act, and it was held that beds of building stone

were within the reservation. Parke, B., in his opinion, said: "The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines." In *Bell* v. *Wilson* (1 Ch. App., 303), under a conveyance of land reserving to the grantor "all mines or seams of coal and other mines, metals, or minerals," it was held that the reservation included freestone. *Hext* v. *Gill* (L. R., 7 Ch. App., 699) is an important case on the subject, because Mellish, L. J., in his opinion formulates as the result of the adjudged cases the principle upon which the cases proceed, and which has been followed and applied in several subsequent cases. That was a case of a reservation in a private grant by the lord of a manor of "all mines and minerals within or under the premises," and the question was whether beds of china clay, the product of disintegration of granite, not known to exist in the land at the time of the grant, were embraced within the reservation, and the court decided that they were. Mellish, L. J., said: "The result of the authorities, without going through them, appears to be this, that a reservation of 'minerals' includes every substance that can be got from underneath the surface of the earth, for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same principle was expressed in another form by Bowen, L. J., in the case of *Earl of Jersey* v. *Guardians*, etc. (L. R., 22 Q. B. Div., 555),

following the case of *Hext* v. *Gill* (*supra*) in which he said that the word applies to all substances of a mineral nature which have "a use or value of their own, independent of their being constituents of the soil."

* * * * *

Lord Romilly, in *Midland Railway Co.* v. *Checkley* (L. R., 4 Eq. Cas., 19), construing a reservation in an act for the compulsory taking of land for canals, of "all mines and minerals within and under the land," in which the question was whether the right to quarry paving stones was reserved, said: "Stone is, in my opinion, clearly a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is granite, marble, fire clay or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land. Every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, in the same category." We shall refer only to another English case, the latest on the subject (*Attorney-General* v. *Welsh Granite Co.*, 35 Week. Rep., 617), decided in 1887, which held that granite was a mineral within a reservation of "mines and minerals."

* * * * *

Upon the authorities we think we should not be justified in holding that granite was not embraced in a reservation or grant of "minerals" in the absence of qualification. It is no doubt true that this word in its more common

application in a grant of "minerals" would be deemed to refer to metallic substances. This perhaps grows out of the fact that mining is to a great extent prosecuted for the purpose of obtaining gold, silver, iron, and other metals, and grants of "minerals" or reservations thereof in conveyances of public lands are most frequently made with reference to mineral-bearing ores or deposits. But it would be an unwarrantable limitation of such a grant or reservation to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time. The grant or reservation of minerals in a deed contemplates substances to be severed and taken away from the premises, and it is difficult to suppose that the parties to such a deed intended to exclude from the grant any description of valuable mineral which would come within the legal meaning of the word, which might thereafter be discovered. We are of opinion, therefore, that the words "minerals and ores" in the grant of 1871, standing alone, would include the granite upon the premises.

The case of *Brady* v. *Brady et al.* (31 Misc. Rep., 411, 65 N. Y. Supp., 621), involved the question whether limestone or granite ledges were within the meaning of an exception of "all mines and minerals" from a deed of conveyance. It was there held:

> The 20 acres in question are largely covered with limestone or granite ledges, rising above the natural surface of the ground. There is, it

is true, some timber and some tillable land, but probably the chief value of the property consists in this stone. To obtain this mineral a quarry has been opened.

* * * * *

Under the La Farge deed, the ownership of the limestone and granite upon the 20 acres in question, and the right to enter, dig for, and carry away the same, remained in the grantor, and passed to his children under his will (*Armstrong* v. *Granite Co.*, 147 N. Y., 495, 42 N. E., 186; *Hext* v. *Gill*, 7 Ch. App., 699). The material, clearly, is a mineral, and it is reserved from the grant unless "the nature and context of the deed show that it was not intended to be included" in the reservation. There is nothing to justify such a finding.

The two cases last mentioned were cited with approval in the case of *Phelps* v. *Church of Our Lady, etc.*, decided by the circuit court of appeals for the third circuit (115 Fed. Rep., 882), wherein *marble* was held to be a mineral within the meaning of an exception of "mines and minerals" from a conveyance of land.

See also *Hartwell* v. *Camman* (10 N. J. Eq., 128), wherein "paint stone" was held to be a mineral within the meaning of an exception of "mines and minerals" contained in a deed of conveyance.

In the case of *Gill* v. *Weston* (110 Pa. St. Rep., 312, 317), the question whether petroleum is a mineral within the meaning of a certain act of the State legis-

lature, passed April 27, 1855, was involved. The court said:

> It matters not that the act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.

This case, in effect, though not in express terms, overruled the case of *Dunham* v. *Fitzpatrick* (101 Pa. St., 36), cited by counsel for the company. See also *Westmoreland Gas Company* v. *De Witt* (130 Pa. St., 235); *Hague et al.* v. *Wheeler et al.* (157 Id., 324, 341).

In the case of *Buffalo Natural Gas Fuel Company* (73 Fed. Rep., 191) natural gas was held to be "a crude mineral."

In the recent case of *Ruttledge* v. *Cress* (17 Pa. Superior Ct., 490) it was held that an act of the legislature, passed May 8, 1876, imposing damages upon any person mining or digging out "any coal, iron or other minerals, knowing them to be upon the land of another," applies to the act of digging and carrying away *building stone* from an open quarry on the surface of the ground.

Bainbridge, in his work on "The Law of Mines and Minerals" (pp. 1 and 2), gives the following definition of the term "mineral:"

> A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which

> now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores.

In the work of Barringer and Adams on the Law of Mines and Mining in the United States, page lxxvi, "mineral," in its general legal sense is defined to be:

> Any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.

We submit a few observations upon the cases cited by counsel for the company, pages 34–37 of their brief.

Dunham v. *Kirkpatrick* (101 Pa. St., 36): This case, as already stated, was, in effect, overruled in the more recent case of *Gill* v. *Weston* (110 Pa. St, *supra*).

The same may be said with respect to the case of *Gibson* v. *Tyson* (5 Watts, 34), in so far as that case is relied upon as having announced the principle that only metallic substances are properly within the meaning of the term "mineral."

In *Alfred* v. *Barnum* (45 Cal., 482) it was held that the mere fact that land contains particles of gold or veins of gold-bearing rock does not necessarily impress it with the character of "mineral land" within the meaning of the Pacific grants of July 1, 1862, and July 2, 1864; that to be so classed the land must at

least be shown to contain quantities of mineral sufficiently valuable to render it available and valuable for mining purposes. We do not see that this case furnishes any authority against the principle we contend for.

To the same effect is the case of *Merrill* v. *Dixon* (15 Nevada, 401, 407). It was there said:

> In excluding mineral lands, Congress only intended to exclude lands *valuable* for mining purposes. It is only *valuable* mineral lands and deposits that are reserved from sale, except as provided by law, in respect to mineral lands. (See U. S. Rev. Stat., 2318, 2319.)

The case of *Overman Silver Mining Company* v. *Corcoran* (15 Nevada, 147) can not be considered as more than a holding to the effect that no valid location of a mining claim can be made under the provision of the mining laws relating to lode claims until discovery of a vein or lode within the limits of the location—a proposition we do not dispute.

McKeon v. *Bisbee* (9 Cali., 137), does not make the ruling stated by counsel. The quotation given in the brief is taken from the argument in the case, and not from the opinion.

In the case of *Stevens* v. *Williams* (1 McCreary), a vein, lode, or ledge, within the meaning of the mining laws, was held to be "a mineral body of rock within defined boundaries in the general mass of the mountain." This can have no bearing upon the question as to the meaning of the language, "including all forms of

deposit, excepting veins of quartz, or other rock in place," used in section 2329. Neither can the case of *Stevens* v. *Gill* (1 Morrison's Mining Reports, 579), wherein what constitutes a lode or vein under section 2319 was stated.

In *Eureka, etc., Company* v. *Richmond Mining Company* (4 Sawyer, 302) it was held that—

> The terms "veins" and "lodes" as used by miners and in the mining acts of Congress are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

To the same general effect are the cases of *Reynolds* v. *Iron Silver Mining Company* (116 U. S. 695); *Richmond Mining Company* v. *Eureka Mining Company* (103 id., 839); *Jupiter Mining Company* v. *Bodie Company* (7 Sawyer, 96).

Both the English and American authorities, with practical unanimity, agree that the word "mineral" in its legal and generally accepted sense, as used in legislative land grants and in deeds of conveyance by individuals, embraces nonmetallic as well as metallic substances. The authorities also agree with like unanimity that *marble*, *limestone*, *granite*, *building stone*, *sandstone*, etc., are minerals. There can be no question that these substances are regarded as minerals by the most approved text writers and also by the highest judicial tribunals both in England and America.

In the administration of the mining laws, as has been shown, the Land Department early adopted the rule

that whatever is recognized as a mineral by the standard authorities on the subject, whether metallic or non-metallic, where found in quantity and quality sufficient to render it valuable and to render the lands containing it more valuable on that account than for agricultural or other purposes for which lands are ordinarily used, should be treated as within the purview of those laws. This rule has been followed from the time of its adoption to the present day. The land here in question is within the rule. It is admitted to be *valuable*, and *chiefly valuable*, for the deposit of granite or building stone contained therein. It was located and has been entered and patented as "mineral land" under the mining laws in accordance with the long-established practice. Many thousands of acres of land of like character have been entered and patented in the same manner.

The mining laws were enacted, codified, and incorporated in the Revised Statutes before any rights had attached or become vested under the Northern Pacific grant. These laws provided that *all lands valuable for minerals* should be reserved from sale except as therein directed; and declared that *all valuable mineral deposits* in lands belonging to the United States should be free and open to exploration and purchase in the manner therein provided.

The grant to this company expressly excluded "all mineral lands," excepting coal and iron, from its operation. The joint resolution of July 30, 1865, adopted by the same Congress that made the grant, declared

that it shall not "be so construed as to embrace mineral lands, which in *all cases* are reserved exclusively to the United States." The mining laws from their earliest history have been administered by the Land Department as applicable in all their force and effect to the public mineral lands within the limits of the grant. (*Central Pacific R. R. Co.* v. *Valentine*, 11 L. D., 238.) This practice has been sustained by this court. (*Barden* v. *Northern Pacific R. R. Co.*, 154 U. S., 288.)

The provision in the act of July 26, 1895, that lands should be classified as mineral within the meaning of this grant, which by reason of valuable mineral deposits were open to exploration, occupation, and purchase under the provisions of the mining laws, was a recognition by Congress of the principle which had theretofore obtained in the administration of those laws with respect to their applicability to lands containing valuable deposits of *marble*, *limestone*, *granite*, and *building stone*. This practice was also sanctioned, as we have shown, by the act of August 4, 1892, when considered in the light of the circumstances which led to its passage.

We submit that the land in question is *mineral land* and did not pass to the company under its grant.

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